No. 10-330

In the Supreme Court of the United States

EDMUND G. BROWN, JR., GOVERNOR OF CALIFORNIA, ET AL., PETITIONERS

v.

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, AKA RINCON SAN LUISENO BAND OF MISSION INDIANS, AKA RINCON BAND OF LUISENO INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANN O'CONNELL
Assistant to the Solicitor General

WILLIAM B. LAZARUS
LANE N. MCFADDEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HILARY C. TOMPKINS
Solicitor

PATRICE H. KUNESH
Deputy Solicitor

EDITH BLACKWELL
Associate Solicitor

ANDREW S. CAULUM
Attorney-Advisor
Department of the Interior
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether petitioners made a "demand for direct taxation" of an Indian tribe, which shall be considered as evidence that a State did not negotiate in good faith under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7)(B)(iii), when petitioners would only consider compact terms that required a share of tribal gaming revenue to be paid into the State's general fund.

2. Whether the courts below had authority, in determining whether petitioners made a "demand for direct taxation" of an Indian tribe under 25 U.S.C. 2710(d)(7)(B)(iii), to evaluate whether petitioners made a "meaningful concession" to the tribe in exchange for its insistence on general-fund revenue sharing.

TABLE OF CONTENTS

Page

Statement 1
Discussion 9
A. The court of appeals reasonably concluded that the State did not negotiate in good faith 10
B. Other considerations advanced by the state do not warrant this Court's review 17
Conclusion 22

TABLE OF AUTHORITIES

Cases:

Continental Ins Co v. *NLRB*, 495 F 2d 44 (2d Cir. 1974) 15
Hotel Employees & Rest. Employees Int'l Union v. *Davis*, 981 P 2d 990 (Cal. 1999) 4
Indian Gaming Related Cases, In re, 331 F 3d 1094 (9th Cir. 2003), cert. denied, 540 U.S 1179 (2004) 3, 4, 5, 12, 14
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 2
Seminole Tribe of Florida v. *Florida*, 517 U S 44 (1996) 2, 3
White Mountain Apache Tribe v *Bracker*, 448 U S. 143 (1980) 13
Wisconsin v. *Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008) 17

Constitutions and statutes:

U.S. Const. Amend XI 3, 21
Cal. Const. Art. IV , § 19(e) (1984) 4

Statutes—Continued Page

Administrative Procedure Act, 5 U.S.C. 551 *et seq* 21
Indian Gaming Regulatory Act, 25 U.S C. 2701 *et seq.* 1
25 U.S.C. 2701(3) 1
25 U S C 2701(5) 2
25 U.S.C. 2702 ..... 8, 12, 13
25 U.S.C. 2703(6)-(8) 2
25 U.S.C. 2710(d)(1)(A) 2
25 U.S.C 2710(d)(3)(A) 3, 5
25 U.S.C. 2710(d)(3)(C)(i)-(vi) 2
25 U.S.C. 2710(d)(3)(C)(iii) 2, 3
25 U S.C. 2710(d)(3)(C)(vii) 2, 8, 12
25 U.S.C. 2710(d)(4) 2, 3, 14, 15
25 U.S.C. 2710(d)(7)(A) 18
25 U.S.C. 2710(d)(7)(B) 16
25 U S C 2710(d)(7)(B)(ii) 3, 4, 10
25 U.S.C. 2710(d)(7)(B)(ii)(I) 20
25 U.S.C. 2710(d)(7)(B)(iii) 3, 14
25 U S C. 2710(d)(7)(B)(iii)-(iv) 4
25 U.S.C 2710(d)(7)(B)(iii)(I) 7, 14
25 U.S.C. 2710(d)(7)(B)(iii)(II) ..... *passim*
25 U.S.C 2710(d)(8) 4, 17, 18
25 U.S.C. 2710(d)(8)(B) 20
25 U.S.C. 2710(d)(8)(B)(i)-(iii) 4
25 U.S.C. 2710(d)(8)(C) 4, 20, 21

Miscellaneous: Page

Letter from Larry Echo Hawk, Assistant Secretary of the Interior for Indian Affairs, to Chairman Mitchell Cypress, Seminole Tribe of Florida (June 24, 2010) 20

Letter from Larry Echo Hawk, Assistant Secretary of the Interior for Indian Affairs, to Chairperson Sherry Treppa, Habematolel Pomo of Upper Lake (Aug 17, 2010) 19

Letter from Larry Echo Hawk, Assistant Secretary of the Interior for Indian Affairs, to Chairwoman Leona Williams, Pinolevill Pomo Nation (Feb. 25, 2011) 19

S. Rep. No. 446, 100th Cong., 2d Sess. (1988) 13, 14

In the Supreme Court of the United States

No. 10-330

EDMUND G. BROWN, JR., GOVERNOR OF CALIFORNIA, ET AL., PETITIONERS

v.

RINCON BAND OF LUISENO MISSION INDIANS OF THE RINCON RESERVATION, AKA RINCON SAN LUISENO BAND OF MISSION INDIANS, AKA RINCON BAND OF LUISENO INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq*., to provide a statutory basis for the operation and regulation of gaming on Indian lands. 25 U.S.C. 2701(3). IGRA provides that an Indian tribe may conduct gaming activity on Indian lands if the activity "is not specifically prohibited by Federal law and is conducted within a State

which does not * * * prohibit such gaming activity." 25 U.S.C. 2701(5). The statute divides gaming activities into three classes, each subject to different regulations. 25 U.S.C. 2703(6)-(8). Class III gaming, the type of gaming at issue in this case, includes such things as slot machines, casino games, banking card games, and lotteries. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 48 (1996). It may be conducted only under terms of a compact negotiated between an Indian tribe and a State. 25 U.S.C. 2710(d)(1)(A).

A Class III gaming compact may include several specific types of provisions, including a provision relating to "an assessment by the State * * * to defray the costs of regulating" gaming activity. 25 U.S.C. 2710(d)(3)(C)(iii). In addition to other specific provisions listed in 25 U.S.C. 2710(d)(3)(C)(i)-(vi), IGRA also states that a Class III gaming compact may include provisions relating to "any other subjects that are directly related to the operation of gaming activities." 25 U.S.C. 2710(d)(3)(C)(vii).

IGRA was enacted against a legal background in which "Indian tribes and individuals generally are exempt from state taxation within their own territory," absent express authorization by Congress. *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Consistent with that principle, IGRA provides that with the exception of assessments permitted by Section 2710(d)(3)(C)(iii), to defray the State's costs of regulating gaming activity, IGRA shall not be interpreted "as conferring upon a State * * * authority to impose any tax, fee, charge, or other assessment upon an Indian tribe to engage in a class III activity." 25 U.S.C. 2710(d)(4). Nor may a State refuse to enter into negoti-

ations based on "the lack of authority to impose such a tax, fee, charge, or other assessment." *Ibid.*

b. When a tribe requests negotiations for a Class III compact, IGRA requires the State to "negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A). IGRA provides a comprehensive process to prevent an impasse in compact negotiations, which is triggered when a tribe files suit alleging that the State has refused to negotiate or has failed to negotiate in good faith. 25 U.S.C. 2710(d)(7)(B)(ii); see generally *Seminole Tribe*, 517 U.S. at 49-50.[1] To determine whether a State has negotiated in good faith, a court:

> (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

25 U.S.C. 2710(d)(7)(B)(iii). The Ninth Circuit has construed this section to include consideration of whether the State offered "meaningful concessions" to the tribe in exchange for any payments (beyond assessments under 25 U.S.C. 2710(d)(3)(C)(iii)) it attempted to negotiate. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111 (2003), cert. denied, 540 U.S. 1179 (2004) ("*Coyote Valley II*").

---

[1] The judicial review provisions of IGRA do not abrogate a State's Eleventh Amendment immunity to suit *Seminole Tribe of Florida* v *Florida*, *supra*. A federal court therefore has no jurisdiction over a suit against a State that does not consent to be sued.

If a tribe presents evidence of bad faith, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii). If the court concludes that the State has failed to negotiate in good faith, it may order the parties to conclude a compact under the supervision of a mediator. 25 U.S.C. 2710(d)(7)(B)(iii)-(iv).

c. Once the parties reach an agreement, the Secretary of the Interior has 45 days to approve or disapprove the compact. 25 U.S.C. 2710(d)(8). The Secretary may disapprove a compact only if it violates (1) a provision of IGRA; (2) any other provision of federal law; or (3) the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8)(B)(i)-(iii). If the Secretary takes no action within 45 days, the compact is considered approved, "but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C).

2. a. Before 2000, the California Constitution prohibited Class III gaming. Cal. Const. Art. IV, § 19(e) (1984); *Hotel Employees & Rest. Employees Int'l Union* v. *Davis*, 981 P.2d 990 (Cal. 1999). In 2000, California voters approved Proposition 1A, which had been proposed by the Governor and passed by the Legislature. See *Coyote Valley II*, 331 F.3d at 1098-1107. Proposition 1A amended the California Constitution to permit the State to negotiate compacts with federally recognized Indian tribes for certain Class III gaming activities. *Ibid.* Because non-Indian parties were still forbidden from operating gaming facilities, Proposition 1A granted Indian tribes "a constitutionally protected monopoly on most types of class III games in California." *Id.* at 1103.

In late 1999, a number of Indian tribes, including respondent, Pet. App. 4, signed letters of intent to enter

into Class III gaming compacts with California, which would become effective if California voters passed Proposition 1A. *Coyote Valley II*, 331 F.3d at 1104. Most of the 1999 compacts provided for the tribes to contribute into two special funds out of net revenues of their gaming operations. The Revenue Sharing Trust Fund (RSTF) is redistributed to eligible tribes that either do not conduct gaming operations or operate fewer than 350 gaming devices; and the Special Distribution Fund (SDF) is earmarked for expenditures on gaming-related activities such as gambling-addiction treatment, reimbursement to state and local governments for impacts of gaming and compensation for regulatory costs, and any potential shortfalls in the RSTF. Pet. App. 6.[2]

b. Respondent currently operates a Class III gaming facility near San Diego, pursuant to a 1999 compact with California. In 2003, exercising a clause in its 1999 compact, the tribe notified the State that it wished to renegotiate some provisions of the compact, Pet. App. 7, and the parties began negotiations pursuant to 25 U.S.C. 2710(d)(3)(A).

Under the State's first offer, the State would approve 900 additional slot machines, and the tribe would pay the State 15% of its net win from the new machines as well as a 15% annual fee based on the tribe's total 2004 net revenue. Pet. App. 8. The State also offered an "exclusivity provision," the terms of which would be subject to future negotiation. *Id.* at 8-9 n.7. The tribe agreed that it would pay a per-device fee for each new machine, but emphasized that the use of any such fees had to be used for gaming-related activities. *Id.* at 9. The tribe also

[2] Because respondent operated fewer than 200 gaming devices on September 1, 1999, it is not required to make payments to the SDF under its existing compact. Pet. App. 73-74.

noted that because Proposition 1A already provided for tribal gaming exclusivity, the State's offer of exclusivity "would not provide Rincon with any meaningful economic advantages that would warrant the tribe making the requested payments." *Id.* at 10. The tribe rejected that offer. *Ibid.*

The State subsequently offered to reduce the annual fee to 10% and to extend the compact term by five years. Pet. App. 11-12 The State later followed with an offer to permit only 400 new machines, with the tribe to pay 25% of its net win on those machines to the State's general fund as well as $2 million to the RSTF. *Id.* at 11. That offer was accompanied by an economic analysis of its offer of 900 new machines and a 10% annual fee, which demonstrated that the tribe would gain $2 million in additional revenues, and the State would receive an additional $38 million. The tribe rejected this offer.

3. In a suit alleging that the State had refused to negotiate in good faith, the district court granted summary judgment for the tribe. Pet. App. 128-172. The court concluded that California's "insistence on an exchange of revenue earmarked for the State's general fund" amounted to bad faith negotiation. *Id.* at 156 (emphasis omitted). The court explained that whether a State's demand for fees amounts to bad faith depends on "the nature of both the fees demanded and the concessions offered in return." *Id.* at 157. The court concluded that the State's offer of exclusivity was not a meaningful concession because "the State ha[d] already given a monopoly to tribal gaming" in the existing compact. *Id.* at 160. The court also noted that the State had demanded that the tribe "pay a fee directly to the state that is unrelated to gaming and has no limitations on its use," and concluded that such a fee "falls outside the scope of 25

U.S.C. § 2710(d)(3)(C)(iii), which only allows assessments by the State in order to defray the costs of regulating gaming activity." *Id.* at 166-167. The court concluded that "the State's insistence on the payment of such a large fee to its general fund in return for concessions of markedly lesser value was in bad faith in light of the prohibition against taxation set forth in the IGRA." *Id.* at 168. The court ordered the parties to conclude negotiations within 60 days, or to submit proposals to a mediator. *Id* at 172.

4. The court of appeals affirmed. Pet. App. 1-53.

a. The court explained that during negotiations, the State "repeatedly emphasized its position that it would not give Rincon more devices or time without a reciprocal benefit to the State," and the only benefit it sought was general fund revenue sharing. Pet. App. 21-22. The court concluded that "a non-negotiable, mandatory payment of 10% of net win into the State treasury for unrestricted use yields public revenue, and is [therefore] a 'tax,'" *id.* at 21, and that the court was therefore required to consider the State's demand as evidence of bad faith under 25 U.S.C. 2710(d)(7)(B)(iii)(II). The court noted that the State could rebut the presumption of bad faith by demonstrating that the revenue demanded was to be used for "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities," Pet. App. 27 (quoting 25 U.S.C. 2710(d)(7)(B)(iii)(I)), but the State's need for general tax revenue was insufficient to demonstrate good faith.

The court of appeals further explained that in *Coyote Valley II*, it had held that "a State may, without acting in bad faith, request revenue sharing if the revenue sharing provision is (a) for uses 'directly related to

the operation of gaming activities in [Section] 2710(d)(3)(C)(vii), (b) consistent with the purposes of IGRA, and (c) not 'imposed' because it is bargained for in exchange for a 'meaningful concession.'" Pet. App. 29 (emphasis omitted). The court concluded that the State's offers in this case failed all three requirements.

First, the court rejected the State's argument that general-fund revenue sharing was authorized by the catchall provision that permits Class III gaming compacts to include provisions relating to "any other subjects that are directly related to the operation of gaming activities," 25 U.S.C. 2710(d)(3)(C)(vii). Pet. App. 29-32. The court explained that "the mere fact that the revenue [is] derive[d] from gaming activities," without regard to the use to which the revenue would be directed, does not mean that the subject is directly related to gaming. *Id.* at 30.

Second, the court concluded that a general-fund revenue-sharing request was not consistent with IGRA's purposes. Pet. App. 32-36. The court explained that according to 25 U.S.C. 2702, "IGRA is intended to promote tribal economic development, prevent criminal activity related to gaming, and ensure that gaming activities are conducted fairly," Pet. App. 32, but not to promote the States' economic development, *id.* at 32-33, 35-36.

Third, the court concluded that the State had failed to offer any meaningful concession demonstrating that revenue sharing was proposed as an aspect of negotiations, rather than imposed though an inflexible demand. Pet. App. 36-48. The court explained that "in the current legal landscape" in California, "'exclusivity' is not a new consideration the State can offer in negotiations because the tribe already fully enjoys that right as a

matter of state constitutional law," which allows only Indian tribes to conduct casino-type gaming. *Id.* at 39. The court further explained that even if the offer would allow the tribe to cancel its obligation to make the payments in the event that Proposition 1A is overturned, that concession was only of "speculative value" because repeal of Proposition 1A was "extremely unlikely." *Id.* at 41-42.

b. Judge Bybee dissented. Pet. App. 53-127. In his view, the "essential characteristic that defines a tax" is that a monetary payment is imposed by the government, so requests for revenue sharing made during compact negotiations could not be a tax. *Id.* at 79, 87. Judge Bybee further concluded that the State had not "imposed" a tax on the tribe because the State had offered a meaningful concession in exchange for its demand, which he defined as "something conceded or granted that is real to at least one of the parties and not merely nominal or illusory." *Id.* at 91. Judge Bybee agreed with the majority that the State's offer of territorial exclusivity was not a meaningful concession in light of Proposition 1A, *id.* at 114, but he believed that the State's offer to extend the compact term and authorize additional machines were meaningful concessions, *id* at 115-118.

DISCUSSION

The court of appeals' conclusion that California engaged in bad-faith negotiation by insisting on general-fund revenue sharing in exchange for amendments to respondent's Class III gaming compact reflects a reasonable application of IGRA's provisions governing compact negotiations to the particular circumstances of this case, including California's unique constitutional provi-

sion granting Indian tribes exclusive authority to conduct Class III gaming. The court's decision does not conflict with a decision of any other court of appeals, and it will not interfere with the Secretary's review of gaming compacts or destabilize existing compacts that include revenue-sharing provisions. Further review is therefore unwarranted.

A. The Court Of Appeals Reasonably Concluded That The State Did Not Negotiate In Good Faith

1. IGRA provides that in a suit brought by a tribe pursuant to 25 U.S.C. 2710(d)(7)(B)(ii), contending that a State has failed to negotiate in good faith, the court "shall consider any demand by the State for direct taxation of the Indian tribe * * * as evidence that the State has not negotiated in good faith." 25 U.S.C. 2710(d)(7)(B)(iii)(II). The court of appeals' reliance on this provision in concluding that California's unwavering insistence on general-fund revenue sharing in exchange for amendments to respondent's Class III gaming compact was evidence that the State had not negotiated in good faith rested on a reasonable understanding of the role of this provision in IGRA's framework governing compact negotiation.

a. Petitioners contend (Pet. 32-33) that the court of appeals erred in concluding that the State effectively made a demand for direct taxation because a tax is a monetary payment "imposed by the government," and the State lacks power to "impose" anything in negotiations. Petitioners' position disregards the purposes of IGRA and would largely drain Section 2710(d)(7)(B)(iii)(II) of operative effect. That provision states that a court must consider a demand for direct taxation of the tribe as evidence that the State "has not

negotiated in good faith." As the court of appeals explained, "the only conceivable way a state could 'impose' something during negotiations is by insisting, over tribal objections, that the tribe make a given concession * * * in order to obtain a compact." Pet. App. 24-25.

In this case, each of the State's offers would have required the tribe to pay at least 10% of its net win into the State's general fund, where it could be used for any state purpose, and the State "never wavered from its general fund revenue sharing demands." Pet. App. 43. The court of appeals explained that although IGRA does not prohibit a State from taking hard-line bargaining positions, a State may not take such a position "when it results in a 'take it or leave it offer' to the tribe" to either agree to pay a percentage of its net revenue to the State's general fund, or else go without a compact. *Id.* at 43-44. Under this interpretation, and given the specific facts of this case, the court reasonably determined that the State made a demand for direct taxation of the tribe's gaming activities, which the court was in turn required to consider as evidence that the State was negotiating in bad faith under 25 U.S.C. 2710(d)(7)(B)(iii)(II).

The court of appeals did not hold, as petitioners contend (Pet. 22), that a State's request to negotiate for general-fund revenue sharing must always be regarded as evidence of bad faith, nor would such a categorical view be correct. Recognizing that past negotiations of other compacts had successfully resulted in mutually agreed-upon revenue-sharing provisions, the court of appeals distinguished between a situation in which a State negotiates for revenue sharing, and a situation in which it inflexibly demands such payments. Pet. App. 40 n.17. That distinction is sensible in the special context

of IGRA, and gives meaning to the term "demand" in Section 2710(d)(7)(B)(iii)(II).

b. Petitioners erroneously contend (Pet. 33-34) that the State's demand for general-fund revenue sharing was authorized by IGRA because such payments are "directly related to the operation of gaming activities," 25 U.S.C. 2710(d)(3)(C)(vii). That contention is based on the flawed premise that because the requested payments would be calculated based on the tribe's gaming revenue, they are no different than payments to the RSTF and SDF, which the Ninth Circuit approved in *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111, 1112 (2003), cert. denied, 540 U.S. 1179 (2004). Payments to the RSTF and SDF are not "directly related to the operation of gaming activit[y]" merely because the payment amounts are tied to a tribe's net gaming revenue. The Funds themselves were authorized for gaming-related purposes. See *id.* at 1111; pp. 4-5, *supra*. Payments to the RSTF and SDF are also consistent with IGRA's purpose, because "the nature of [that] revenue sharing * * * [is] primarily motivated by a desire to promote *tribal* interests." Pet. App. 7 (citing *Coyote Valley II*, 331 F.3d at 1110-1115).

c. Finally, petitioners' contention (Pet. 33) that general-fund revenue sharing is necessarily consistent with the purposes of IGRA, and therefore necessarily not evidence of a lack of good faith, is not supported by the statute. The purposes of IGRA, as set forth in 25 U.S.C. 2702, include "promoting tribal economic development, self-sufficiency, and strong tribal governments"; as well as "shield[ing] [Indian gaming] from organized crime and other corrupting influences, * * * ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation, and * * * assur[ing]

that gaming is conducted fairly and honestly by both the operator and players." *Ibid.* Payment of a share of a tribe's gaming revenue to the State's general fund, where it can be used for purposes having no relation to Indian tribes or gaming, does not further any of those purposes. Cf. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 149 (1980) (rejecting attempt by Arizona to impose fuel tax on logging operation conducted on tribal lands because tax "would threaten the overriding federal objective" of guaranteeing Indians the benefit of whatever profit their property could yield).

Petitioners do not argue that payments to the State's general fund would serve the purposes specified in Section 2702. Instead, they refer (Pet. 33) to a passage in the Senate Report on IGRA, which recites that "[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, *including its economic interest in raising revenue for its citizens*." S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988) (emphasis added). Petitioners contend, based on this language, that its own economic interests are necessarily a relevant consideration in a good-faith determination under IGRA. That is incorrect.

Nothing in the text of IGRA supports the State's contention that a broad interest in generating revenue for the State is a purpose of the statute. IGRA specifically provides that the statute furnishes no new authority for a State to require payments of "any tax, fee, charge, or other assessment" from an Indian tribe, other than assessments to defray costs of regulating the

tribe's gaming activity. 25 U.S.C. 2710(d)(4). The statement in the Senate Report is best understood to mean that a State's "other interests" might include considering the effect of a compact on competing gaming activities in the State, such as the California Lottery. See Pet. App. 34. That understanding is supported elsewhere in the Senate Report, which discusses the problem that States and non-tribal gaming operators might try to use compact requirements to impede tribal competition. *Id.* at 35 (citing S. Rep. No. 446, *supra* at 1-2). To ensure that such issues concerning existing gaming operations would nonetheless be taken into account, IGRA provides that a State's concerns about "adverse economic impacts on existing gaming activities" are among the factors relevant in determining whether a State has negotiated in good faith. 25 U.S.C. 2710(d)(7)(B)(iii)(I).

2. The court of appeals also reasonably rejected petitioners' contention (Pet. 34-38) that the State offered a "meaningful concession" to the tribe in exchange for its request for general-fund revenue sharing, which would indicate that it was negotiating in good faith.

a. In conducting a good faith analysis under 25 U.S.C. 2710(d)(7)(B)(iii), a federal court may conclude that a State did not effectively make a demand for direct taxation by requesting revenue sharing during negotiations if the State offered meaningful concessions in exchange. In those circumstances, the court would not be required to weigh the State's revenue-sharing request as evidence of an absence of good faith under Section 2710(d)(7)(B)(iii)(II). See *Coyote Valley II*, 331 F.3d at 1112. Petitioners contend (Pet. 35-36) that the court's review must be limited to determining whether the State's offer was a "sham." As support for that conten-

tion, petitioners state that under the National Labor Relations Act (NLRA), "[a]n employer engages in bad faith * * * bargaining when it conducts negotiations 'as a kind of charade or sham, all the while intending to avoid reaching an agreement.'" Pet. 27 (quoting *Continental Ins. Co.* v. *NLRB*, 495 F.2d 44, 48 (2d Cir. 1974)). IGRA, however, involves a distinctive framework for compact negotiations between a State and an Indian tribe.

A court conducting an inquiry into good faith under IGRA is not simply determining whether the State has offered *any* consideration in exchange for its request for revenue sharing Because IGRA negotiations are conducted against a background principle that a State may not tax Indian tribes for conduct occurring on Indian lands, see also 25 U.S.C. 2710(d)(4) (stating that IGRA shall not be interpreted "as conferring upon a State * * * authority to impose any tax, fee, charge, or other assessment upon an Indian tribe * * * to engage in a class III activity"), IGRA renders it appropriate for the reviewing court to consider whether the State's bargaining position was effectively a "demand for direct taxation." 25 U.S.C. 2710(d)(7)(B)(iii)(II). In order to do so, the court has little choice but to compare the relative values of the concessions offered by each side, at least to the extent of ascertaining whether what the State insisted upon was greatly disproportionate. The NLRA contains no comparable provisions necessitating an inquiry into the nature and relative value of a particular demand by one party.

A district court's important statutory role in assessing gridlock in compact negotiations under IGRA also undermines petitioners' contention (Pet. 27-29) that if a federal court scrutinizes too closely the concessions of-

fered by each side during negotiations, the Judicial Branch would intrude on the sovereignty of the State and the tribe, and raise separation-of-powers concerns. Federal court review of whether the State has negotiated in good faith is expressly required by IGRA if the tribe files suit, 25 U.S.C. 2710(d)(7)(B), and that review includes a determination of whether the State's bargaining position included a "demand for direct taxation," see 25 U.S.C. 2710(d)(7)(B)(iii)(II), or its functional equivalent.

Furthermore, as the court of appeals recognized, the State's view neglects the "plain fact that neither tribes nor states enter IGRA negotiations 'voluntarily' in the way parties do" in standard arms-length contract negotiations. Pet. App. 22-23. Rather, the parties are obligated to negotiate concerning a compact should a tribe wish to engage in Class III gaming activity, and the tribe may not engage in gaming without a compact. The State's negotiating tactics must be viewed within the context of this unique statutory framework and allocation of bargaining power.

b. In any event, the court of appeals reasonably concluded that under the specific circumstances of this case, the State did not offer meaningful concessions in exchange for its demand that the tribe pay a share of its net gaming revenue into the State's general fund. That fact-bound determination does not warrant this Court's review.

The court of appeals reasoned that the State's offer of exclusivity would be "practically worthless" to the tribe. Pet. App. 41-42. In doing so, the court reasonably concluded that the repeal of Proposition 1A, which reserves casino-type gaming exclusively to Indian tribes, was unlikely, and that the State's offer of protection in

that scenario was therefore not a meaningful concession. *Ibid.* Judge Bybee agreed with that conclusion, *id.* at 114, which was based on circumstances unique to California. No other State has a constitutional provision granting tribal gaming exclusivity, thereby divesting the State of leverage it might otherwise have to request revenue sharing in Class III gaming compacts. The court of appeals' decision therefore will not affect the ability of other States to offer some form of exclusivity in exchange for revenue sharing with a tribe, as some States have done without violating IGRA's good faith negotiation requirement. See, *e.g.*, Br. in Opp. at 7 n.2 (providing, for each non-California compact discussed by the dissent, citation in each to exchange of exclusivity for revenue-sharing payments). Whether the specific offers that California made to the tribe were of sufficient value in light of the California Constitution to justify revenue-sharing payments is a fact-bound question that does not warrant this Court's review.

B. Other Considerations Advanced By The State Do Not Warrant This Court's Review

Petitioners acknowledge (Pet. 37) that there is no conflict among the courts of appeals on the questions presented in this case.[3] Petitioners nevertheless contend (Pet. 22-31) that certiorari is warranted because the court of appeals' decision will interfere with the Secretary's review of compacts pursuant to 25 U.S.C.

---

[3] In *Wisconsin* v. *Ho-Chunk Nation*, 512 F.3d 921 (2008), the Seventh Circuit declined to decide whether general-fund revenue sharing was inconsistent with IGRA, but noted that "at a minimum," general-fund revenue sharing "does not appear to have been contemplated by Congress as being one of the matters tribes and the states may negotiate over under" IGRA. *Id.* at 933.

2710(d)(8), and will call into question existing tribal gaming compacts that include revenue-sharing provisions. Those concerns are unfounded.

1. The court of appeals' decision will not impinge on the Secretary's authority to review gaming compacts for consistency with IGRA. As petitioners acknowledge (Reply Br. 2), the Secretary's review of compacts "is exercised outside [of] the context of bad-faith litigation." Unlike in a suit brought by a tribe in federal court pursuant to 25 U.S.C. 2710(d)(7)(A), the Secretary, when reviewing a compact under 25 U.S.C. 2710(d)(8), does not directly apply the provision of IGRA stating that a State's demand for direct taxation evidences an absence of good faith, 25 U.S.C. 2710(d)(7)(B)(iii)(II). Rather, the Secretary reviews, for consistency with the *substantive* provisions of IGRA, a compact to which the parties have *agreed*. Additionally, the Secretary's review is broader than a federal court's inquiry into good faith. The Secretary may also disapprove a compact if it violates the United States' trust responsibilities to Indian tribes or any other applicable federal law. 25 U.S.C. 2710(d)(8). For these reasons, the court of appeals' opinion has very little bearing on the Secretary's review of compacts.

In any event, the court of appeals' decision has not "caused mischief" (Pet. 29) in the Secretary's review process. Petitioners identify two gaming compacts submitted to the Secretary for approval after the court of appeals' decision in this case (Pet. 29-31), one of which was approved and one of which was not approved. Based on those two decisions, petitioners contend that "IGRA is no longer being applied uniformly across the nation." *Id.* at 31. The Secretary, however, applied the same analytical framework to those two compacts as was

applied in Secretarial review prior to the court of appeals' decision in this case. See Pet. App. 45-46.

Petitioners point to the Secretary's 2010 disapproval of a compact between California and the Habemotolel Pomo of the Upper Lake (Pet. 29-30), which contained a revenue-sharing provision under which the tribe would pay 15% of its net win into California's general fund. Letter from Larry Echo Hawk, Assistant Secretary of the Interior for Indian Affairs, to Chairperson Sherry Treppa, Habematolel Pomo of Upper Lake 3 (Aug. 17, 2010). As in the offer made to respondent in this case, the Upper Lake Compact contained a provision purporting to guarantee the tribe protection against non-Indian gaming should Proposition 1A be repealed. *Id* at 4. The Secretary found that this provision provided the tribe no more protection than it currently enjoyed, citing and agreeing with the court of appeals' view in this case that "passage of a constitutional amendment eliminating tribal gaming exclusivity is highly unlikely." *Id.* at 5. But the Secretary's decision to disapprove that compact also took into account other circumstances, such as the presence of other competing tribal gaming facilities in the tribe's core geographic area (against which the State's exclusivity offer provided no protection), as well as concerns that repeal of Proposition 1A would not end the tribe's obligation to make payments if commercial gaming arose elsewhere in the State, rather than near the tribe's facility. *Id.* at 5-6.[4]

In contrast, as petitioners note (Pet. 30-31), the Secretary approved a 2010 gaming compact between Flori-

[4] The Assistant Secretary recently disapproved another California compact containing a simular revenue-sharing provision. See Letter from Larry Echo Hawk to Chairwoman Leona Williams, Pinoleville Pomo Nation (Feb 25, 2011)

da and the Seminole Tribe of Florida, which included a provision for general-fund revenue sharing. Letter from Assistant Secretary of the Interior for Indian Affairs to Chairman Mitchell Cypress, Seminole Tribe of Florida (June 24, 2010). In that compact, however, the tribe and the State had demonstrated that the payments were made in exchange for a regional exclusivity provision that increased the tribe's projected net revenues by 20%. *Id.* at 2.

The Secretary's review of each gaming compact is fact-specific and based on multiple factors. The fact that some compacts are approved and some are disapproved does not demonstrate a lack of uniformity in the application of IGRA across the country.

2. Petitioners finally contend (Pet. 23-26) that the court of appeals' decision calls into question the existing gaming compacts that include general-fund revenue sharing and that have either been affirmatively approved by the Secretary pursuant to 25 U.S.C. 2710(d)(8)(B) or have taken effect by operation of law pursuant to 25 U.S.C. 2710(d)(8)(C). Those compacts are not endangered by the opinion below.

When a tribe brings an IGRA suit against a State, it must first introduce evidence that "a Tribal-State compact has not been entered into." 25 U.S.C. 2710(d)(7)(B)(ii)(I). IGRA's judicial review provisions would therefore not be available to a tribe that is already conducting gaming operations pursuant to an existing compact with a State, unless the tribe had sought to reopen negotiations on its compact and reached an impasse. Petitioners do not attempt to show that any tribe would be interested in obtaining relief from an existing revenue-sharing agreement based on the court of appeals' decision (or that tribes generally would not be

precluded from doing so under dispute-resolution provisions of their compacts), and it is unlikely that tribes would typically be so inclined, given the need for long-term financing and stability to operate a gaming facility of any size. Furthermore, most of the States against which such suits might be brought have declined to waive their Eleventh Amendment immunity. See Br. in Opp. 21-22 n.8. As a result, even if IGRA provided a mechanism to challenge the terms of an already-approved compact, most tribes could not bring such challenges.[5]

The court of appeals determined that California could not use the exclusivity it had previously provided to tribes as consideration for new demands for general-fund payments. Pet. App. 40-41. It may be the case that California, alone among the States, would have to offer tribes something other than exclusivity if it wanted to obtain a share of tribal gaming revenue to be paid into the State's general fund as a condition of expanded gaming operations. But that is simply a consequence of a decision by California's voters to grant Indian tribes exclusive authority, on a categorical and permanent basis, to conduct casino-type gaming in the State, without preserving the ability to confer such authority later in exchange for general-fund revenue sharing. Other

[5] A recent decision of the District of Columbia Circuit allowed a non-party to a compact to obtain judicial review under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, of a compact that went into effect by operation of law pursuant to 25 U.S.C. 2710(d)(8)(C). See *Amador County* v. *Salazar*, No. 10-5240 (May 6, 2011). This case is distinguishable from *Amador County*. Even assuming that dispute-resolution provisions would not preclude *parties* to such compacts from bringing challenges, it is unlikely that revenue-sharing tribes with compacts that went into effect by operation of law would be inclined to challenge their own compacts, for the reasons explained above.

States may continue to offer regional exclusivity agreements to Indian tribes in exchange for revenue sharing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

EDWIN S KNEEDLER
Deputy Solicitor General

ANN O'CONNELL
Assistant to the Solicitor General

WILLIAM B. LAZARUS
LANE N. MCFADDEN
Attorneys

HILARY C. TOMPKINS
Solicitor

PATRICE H. KUNESH
Deputy Solicitor

EDITH BLACKWELL
Associate Solicitor

ANDREW S. CAULUM
Attorney-Advisor
Department of the Interior

MAY 2011